

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

v.

Case No. 8:03-cr-00077-JSM-TBM-ALL

SAMI AMIN AL-ARIAN, et al.

**MOTION OF MEDIA GENERAL OPERATIONS FOR LEAVE
TO INTERVENE AND FOR ACCESS TO TRANSCRIPT
AND TO ALL FUTURE HEARINGS**

Media General Operations, Inc. d/b/a *The Tampa Tribune* (“Tribune”) seeks leave to intervene in this case for the limited purposes of seeking: (1) the transcript of a June 28, 2005 hearing; and (2) protection of the public’s right of access to future hearings in this case. Grounds for this motion are set forth in the following memorandum.¹

MEMORANDUM OF LAW

This motion arises from the refusal of courtroom security personnel to allow reporters to be present during a June 28 hearing in this case. This hearing apparently concerned Defendant Hatim Naji Fariz’s motion in limine relating to internet web sites (see Dkt. No. 1233). That seven-page motion was placed in the public court file and did not request a closed-door hearing.²

¹ As a member of the news media, the Tribune – a daily newspaper – has standing to intervene for the limited purpose of seeking access to judicial proceedings. See, e.g., United States v. Ellis, 90 F.3d 447, 449 (11th Cir. 1996); Newman v. Graddick, 696 F.2d 796, 800 (11th Cir. 1983).

² Fariz is one of four defendants charged in a 53-count indictment with supporting, promoting and fundraising for the Palestinian Islamic Jihad, an organization that the United States government has declared to be a terrorist group. Fariz’s co-defendants include former University of South Florida professor Sami Amin Al-Arian, former University of South Florida instructor Sameeh Hammoudeh, and Illinois resident Ghassan Zayed Ballut. The charges include racketeering and conspiracy to commit murder. Because the indictment in this case alleges a
(footnote continued on next page)

Nevertheless, when a Tribune reporter attempted to attend this hearing, court security officers barred him from the courtroom. Although observers in a viewing room elsewhere in the courthouse may have been able to see and hear portions of the hearing, by the time the Tribune's reporter was told of his exclusion and was able to make his way to the viewing room, a substantial amount of the hearing had already transpired. It does not appear that any party asked that the hearing be closed to the news media or the public, and the Tribune was not warned in advance that the courtroom would be closed.

Argument

“What transpires in the courtroom is public property.” Craig v. Harney, 331 U.S. 367, 374 (1947). Federal courts have long recognized the presumption of access that attaches to criminal proceedings. Indeed, a trial is “a public place where the people generally – and the representatives of the media – have a right to be present.” Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 578 (1980). As the Eleventh Circuit has opined, “open proceedings may be imperative if the public is to learn about the crucial legal issues that help shape modern society. Informed public opinion is critical to effective self-government.” Newman v. Graddick, 696 F.2d 796, 800 (11th Cir. 1983).

Hearings on the admissibility of evidence implicate all the policies that dictate openness of the criminal trial itself. U.S. v. Brooklier, 685 F.2d 1162 (9th Cir. 1982). Therefore, rights of access to criminal trials extends to such hearings. Waller v. Georgia, 467 U.S. 39, 46-47 (1984) (Sixth Amendment public-trial right, like First Amendment access right, generally attaches to suppression hearing); In re New York Times Co., 828 F.2d 110, 114 (2d Cir. 1987) (First

worldwide conspiracy dating back as early as 1988, the case has garnered intense local and national public scrutiny.

Amendment right of access attaches to hearing on motion to preclude use of evidence at trial); U.S. v. Criden, 675 F.2d 550, 557 (3d Cir. 1982) (First Amendment right of access extends to pretrial criminal hearings).

Because the First Amendment right of access attaches to criminal trials and proceedings, strict limitations are placed on courts considering closure of such proceedings. First, before a court may close a hearing the public must have notice and an opportunity to be heard on the proposed closure. U.S. v. Valenti, 987 F.2d 708, 713 (11th Cir. 1993). Second, in order to justify a closure order a court must articulate specific findings that “closure is essential to preserve higher values and is narrowly tailored to serve that interest.” Id.; Press-Enterprise, 478 U.S. at 13-14. Indeed, even if a closure is only partial (e.g., some spectators are allowed to be present), a court still must “hold a hearing and articulate specific findings.” See Judd v. Haley, 250 F.3d 1308, 1315, 1320 (11th Cir. 2001) (“Both partial and total closures burden the defendant’s constitutional rights”).

Unfortunately, Supreme Court and Eleventh Circuit procedural and substantive safeguards were not followed on June 28. The motion in limine was not filed under seal. No party filed a motion to close the hearing, and it appears that no party requested that the hearing be closed. The news media were not given notice or an opportunity to be heard regarding closure and were told of the closure only as the hearing began. No justification was ever given, and no findings were made to support closure of the hearing. Thus, the closure of the June 28 hearing suffered from the same fatal flaws as the closure in Newman v. Graddick:

There is nothing in this record that supports the closing of these proceedings to the press and public. The district court did not hold any hearing after proper notice, nor did it enter findings that justify any restrictions on public access to the proceedings.

696 F.2d at 802 (reversing district court's closure). Here, there is no record to support closure, there was no hearing after proper notice, and there are no findings to justify closing the courtroom for the June 28 hearing. As such, the closure was inappropriate.

The procedural and substantive First Amendment protections afforded openness of criminal proceedings ensures that the “presumption of access [is] indulged to the fullest extent not incompatible with the reasons for closure.” Id. On June 28, however, it appears that the presumption of access was discarded. To prevent any further limitations on First Amendment access rights, the Tribune requests notice and an opportunity to be heard prior to any future closed-door hearings. Additionally, if courtroom security personnel closed the June 28 hearing on their own, the Tribune requests that the Court communicate to those personnel the importance of open proceedings and enter an order stating that, absent an order from this Court, the public and members of the news media are to be allowed in the courtroom during any further proceedings in this case. Finally, so that the public will at least have access to a written record of the June 28 hearing, the Tribune requests that a transcript be prepared and placed in the public court file as soon as possible.

CONCLUSION

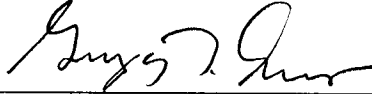
One of the highest orders of the First Amendment is that it commands that the public are entitled to access to criminal proceedings. This First Amendment right of access attaches not only to the criminal trial itself, but also to hearings – which provide the vehicle for resolution of a vast amount of issues in a criminal trial. Such hearings only can be closed upon specific findings, which have not been established in this case.

REQUEST FOR ORAL ARGUMENT

Pursuant to Local Rule 3.01(d), the Tribune respectfully requests oral argument on this motion and estimates that thirty (30) minutes will be required.

Respectfully submitted,

HOLLAND & KNIGHT LLP



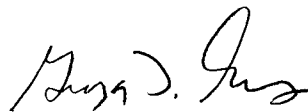
Gregg D. Thomas
Florida Bar No. 223913
100 North Tampa Street, Suite 4100
Post Office Box 1288
Tampa, Florida 33601-1288
(813) 227-8500 (voice)
(813) 229-0134 (fax)
gregg.thomas@hklaw.com

Attorneys for Intervenor
Media General Operations

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 30, 2005, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following:

Terry A. Zitek
Kevin T. Beck
Stephen N. Bernstein
M. Allison Guagliardo
Bruce G. Howie
William B. Moffitt
Linda G. Moreno
Wadie E. Said
Stephen M. Crawford



Attorney